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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Petitioner's co-defendants in district court and appellees in the court of appeals were Hector Berellez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Administration for whom the United States was ultimately substituted as defendant; José Francisco Sosa, a Mexican national resident in the United States under the federal witness protection program; and five unnamed Mexican nationals in the federal witness protection program. Respondent is Humberto Alvarez-Machain.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alvarez-Machain v. *United States*, 107 F.3d 696 (9th Cir.), cert. denied, 522 U.S. 814 (1997)	4
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948)	29
Couzado v. *United States*, 105 F.3d 1389 (11th Cir. 1997)	27
Department of the Navy v. *Egan*, 484 U.S. 518 (1988)	21, 29
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991)	17, 18
Haig v. *Agee*, 453 U.S. 280 (1981)	21, 29
Kasi v. *Angelone*, 300 F.3d 487 (4th Cir.), cert. denied, 537 U.S. 1025 (2002)	24
Nurse v. *United States*, 226 F.3d 996 (9th Cir. 2000)	27
Sami v. *United States*, 617 F.2d 755 (D.C. Cir. 1979)	27
Smith v. *United States*, 507 U.S. 197 (1993)	26
Steele v. *Bulova Watch Co.*, 344 U.S. 380 (1952)	15
United States v. *Alvarez-Machain*:	
946 F.2d 1466 (9th Cir. 1991)	2
504 U.S. 665 (1992)	2, 3, 22-23
United States v. *Bowman*, 260 U.S. 94 (1922)	8, 9, 18
United States v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990)	3
United States v. *Cotton*, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973)	24

Cases—Continued: Page

United States v. *Spelar*, 338 U.S. 217 (1949) 28
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 23, 26, 30
United States v. *Yousef*, 327 F.3d 56 (2d Cir. 2003) 17, 18
United States v. *Zuno-Arce*:
44 F.3d 1420 (9th Cir.), cert. denied, 516 U.S. 945 (1995) 2
25 F. Supp. 2d 1087 (C.D. Cal. 1998) 2

Constitution and statutes:

U.S. Const.:
Art. II:
§ 2, Cl. 2 16
§ 3 ..... 14, 16, 30
Federal Tort Claims Act:
28 U.S.C. 1346 27
28 U.S.C. 1346(b) 2, 4, 5, 14, 27
28 U.S.C. 2671 *et seq.* 2, 4, 14
28 U.S.C. 2674 4
28 U.S.C. 2679 4
28 U.S.C. 2680(k) 4, 8, 14, 26, 28
18 U.S.C. 175 16
18 U.S.C. 351 16
18 U.S.C. 1116(c) 16
18 U.S.C. 1119 16
18 U.S.C. 1201 16
18 U.S.C. 1201(a) 2, 19
18 U.S.C. 1203 ..... 2, 16, 19
18 U.S.C. 1751 16
18 U.S.C. 1956 16
18 U.S.C. 2332b 16
18 U.S.C. 2339B 16
18 U.S.C. 3052 17
21 U.S.C. 878 ..... 2, 7, 9, 21

Statutes—Continued: Page

21 U.S.C. 878(a) 12, 20
21 U.S.C. 878(a)(3) 9, 17, 18
21 U.S.C. 878(a)(5) 17
28 U.S.C. 1350 (Alien Tort Statute) 2, 4
46 U.S.C. App. 1903(a) 19
46 U.S.C. App. 1903(c)(1) 19
49 U.S.C. 46505 16
50 U.S.C. 424 16
Cal. Penal Code (West 1999):
§ 834 5
§ 837 5

Miscellaneous:

Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163 (1989), *available at* 1989 WL 595835 24
131 Cong. Rec. 18,870 (1985) 19
H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970) 19, 20
Statement of Steven W. Casteel, Assistant Administrator for Intelligence Before the Senate Comm. on the Judiciary (May 20, 2003) <http://www.dea/gov/pubs/cngrtest/ct052003.html> 24
Restatement (Third) of Foreign Relations Law (1986) 23

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-121a) is reported at 331 F.3d 604. The panel opinion of the court of appeals (Pet. App. 122a-156a) is reported at 266 F.3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 208a-211a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 3, 2003. On August 27, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Section 878 of Title 21 of the United States Code, and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in the Appendix to the Petition, Pet. App. 250a-255a.

STATEMENT

1. In February of 1985, Drug Enforcement Administration (DEA) Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured for two days to extract information regarding what the DEA knew about the cartel. Camarena-Salazar was then murdered and buried in a park near Guadalajara. See *United States* v. *Zuno-Arce*, 44 F.3d 1420, 1422 (9th Cir.), cert. denied, 516 U.S. 945 (1995). Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. See *United States* v. *Zuno-Arce*, 25 F. Supp. 2d 1087, 1092-1093 (C.D. Cal. 1998); see Pet. App. 213a. DEA officials believe that respondent, "a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 (1992).

In 1990, a federal grand jury indicted respondent for the torture and murder of Camarena-Salazar in violation of, among other statutes, 18 U.S.C. 1201(a), 1203, and the United States District Court for the Central District of California issued a warrant for his arrest. The DEA attempted to obtain respondent's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those negotiations proved unsuccessful, the

DEA approved the use of Mexican nationals to take custody of respondent in Mexico and to transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, then seized respondent from his office in Mexico, and in less than 24 hours moved him to the United States and into the custody of United States law enforcement officials. Pet. App. 5a.

Respondent moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and an extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that respondent be returned to Mexico. See *United States* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), aff'g *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990). This Court reversed. Respondent's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-Machain*, 504 U.S. at 670. Even if the arrest violated international law, the Court further held, respondent could be tried in this country. *Ibid.* The case was remanded for trial. However, at the close of the government's case, the district court granted respondent's motion for a judgment of acquittal. Pet. App. 6a-7a.

2. In 1993, after returning to Mexico, respondent brought this civil action asserting various claims—including false arrest and imprisonment—against the United States, several DEA officials, and seven Mexican nationals. Although respondent also brought tort claims asserting abuse and torture, the district court rejected those claims after trial, finding them "unworthy of belief," "incredible," and "completely contrived," and that respondent had repeatedly "lied dur-

ing his deposition." Pet. App. 277a-228a, 230a, 231a; see *id.* at 224a (earlier findings, in the criminal case, that such claims were "not worthy of belief" and "simply * * * not credible"). Respondent did not appeal those findings, and those claims are therefore no longer at issue in this case. *Id.* at 7a-8a & nn.2-3.

Respondent sought recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which provides that the "United States shall be liable * * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain exceptions and limitations. Respondent's suit against the individual defendants proceeded under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants pursuant to 28 U.S.C. 2679. The United States, however, was not substituted for Sosa, a Mexican national, for respondent's ATS claims against him. Pet. App. 159a & n.2.

a. Following an interlocutory appeal, see *Alvarez-Machain* v. *United States*, 107 F.3d 696 (9th Cir.), cert. denied, 522 U.S. 814 (1997), the district court granted the United States' motion for summary judgment in its entirety. Although the government argued that the action for false arrest and false imprisonment under the FTCA was barred by the exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), the district court rejected that argument. Pet. App. 177a-181a. The court agreed that the arrest took place in Mexico. *Id.* at 177a. But the court held that Alvarez-Machain had stated a "valid 'headquarters claim' for his seizure because it stemmed from a plan which developed entirely within the United States." *Id.* at 181a n.18; see *id.* at 178a-181a.

The district court nonetheless concluded that respondent had failed to establish a false arrest claim under California law.[1] California defines false arrest as "an arrest conducted without lawful authority." Pet. App. 184a. Looking to state court decisions and statutes, *id.* at 184a-185a, the district court determined that California law authorizes peace officers and private citizens to make an arrest whenever they have "reasonable cause" to believe the arrestee committed a felony. *Id.* at 184a (citing Cal. Penal Code §§ 834, 837 (West 1999)). The court concluded that those provisions would "clearly" authorize government agents and private citizens alike to arrest respondent, an indicted criminal suspect. *Id.* at 185a; see *id.* at 189a-190a.

Because the arrest took place in Mexico, the district court also addressed how California law would treat extraterritorial arrests. Pet. App. 185a-190a. The court noted that California law allows a foreign peace officer in fresh pursuit to exercise arrest authority in California. *Id.* at 186a-187a. Similarly, the court explained, California law does not limit citizen arrest authority to California citizens—*i.e.*, "if a peace officer, or any individual, from another state entered California with the requisite probable cause to arrest an individual, then California would presumably not consider that action a false arrest." *Id.* at 187a. Because

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[1] Under the FTCA, the government's liability is determined according to local law. See 28 U.S.C. 1346(b) (giving courts jurisdiction over certain tort claims "if a private person" would "be liable to the claimant in accordance with the law of the place where the act or omission occurred"). The government argued that, because the arrest occurred in Mexico, Mexican law should govern—and that, for that reason, the foreign country exception of the FTCA applied. However, the parties agreed that if, contrary to the position of the United States, Mexican law did not apply, California law would. Accordingly, the district court applied California law.

the government had probable cause to arrest, the district court concluded that the arrest was not false within the meaning of California law. *Id.* at 189a-190a.

The district court, however, granted summary judgment against one of the Mexican nationals, José Francisco Sosa, holding him liable under the ATS. In particular, the court concluded that respondent's transborder arrest and detention violated international law. Pet. App. 194a-199a, 209a-210a. Nonetheless, the court held that respondent was entitled to damages only from the time he was seized in Mexico until he was handed over to law enforcement officials in the United States. Once respondent was handed over to United States officials, the court held, the United States law enforcement authorities made an independent and lawful decision to keep respondent in custody for which Sosa could not be held liable. *Id.* at 233a-241a. After trial (and after rejecting respondent's claims of mistreatment, see pp. 3-4, *supra*), the court entered judgment for respondent and against Sosa in the amount of $25,000. Pet. App. 244a, 247a.

3. Respondent and Sosa appealed, and a panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 122a-156a.

With respect to the FTCA false arrest claim against the United States, the panel reversed the judgment in favor of the United States. The panel stated that to "determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law." Pet. App. 142a. The panel agreed that the criminal statutes under which respondent was indicted expressly apply to acts occurring abroad. See *id.* at 143a. It agreed that there was probable cause for respondent's arrest for those crimes. *Ibid.* And it agreed that

the arrest authority provided to DEA agents under 21 U.S.C. 878—authority to "make arrests without warrant * * * for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"—is very broad. Pet. App. 142a.

The panel, however, refused to hold that DEA agents have statutory authority to enforce extraterritorial laws abroad, remarking that "[i]f this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community." Pet. App. 144a. The panel instead "suppose[d] that Congress intended for federal law enforcement officers to obtain lawful authority, which for example, here might be a Mexican warrant, from the state in which they sought to arrest someone." *Ibid.* Because the DEA did not obtain an arrest warrant from a Mexican court, the panel concluded that respondent's arrest was effected "without lawful authority" and was actionable against the United States as a "false arrest" under the FTCA. *Id.* at 144a-145a.

The panel also rejected the district court's conclusion that the arrest was not "false" under California law. Pet. App. 145a-147a. The court did not dispute that, under California law, an arrest effected outside the scope of an officer's statutory authority may be deemed a lawful citizen arrest. *Id.* at 145a. But the court held that the proper standard for federal officers is the law governing arrests pursuant to a warrant. In this case, the court stated, the warrant issued for respondent's arrest "had no effect in Mexico," and its "invalidity * * * for the purposes of [respondent]'s arrest meant that the DEA agents did not act properly under the general common law." *Id.* at 146a; see *id.* at 147a (arrest improper because court issuing the warrant "had

no jurisdiction to issue a warrant for an arrest in Mexico").

The panel also rejected the government's argument that the claim was precluded by the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 135a-139a. Because the seizure had been planned in the United States, the court stated, the claim was actionable under the so-called "headquarters" exception. See *id.* at 137a-139a.

Finally, the panel affirmed the judgment in favor of respondent against Sosa under the ATS. Pet. App. 126a-133a. The panel first held that the seizure violated "the law of nations" because it infringed respondent's right to "freedom of movement, to remain in his country, and to security in his person." *Id.* at 131a. In the alternative, the court held that the arrest violated the international law prohibition on "arbitrary detentions." *Id.* at 131a-133a. A detention is "arbitrary," the court of appeals held, if it is not "pursuant to law." *Id.* at 131a. Because respondent's seizure in this case occurred pursuant to neither the laws of Mexico nor the laws of the United States, the court held, it was an "arbitrary" arrest. *Id.* at 131a, 132a-133a.

4. The court of appeals then reheard the case en banc, reaching largely the same result by a six-to-five vote. Pet. App. 1a-122a.

a. The en banc majority agreed with the original panel's conclusion that the DEA lacks authority to effect arrests or otherwise enforce United States law outside the United States, even where the statute being enforced applies extraterritorially. The majority accepted that this Court's decision in *United States* v. *Bowman*, 260 U.S. 94 (1922), renders the general presumption against extraterritorial application of United States laws inapplicable to "criminal statutes which are,

as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Pet. App. 36a (quoting *Bowman*, 260 U.S. at 98). The majority thus had "no doubt that the substantive criminal statutes under which [respondent] was charged apply to acts occurring outside the United States." *Ibid.*

The majority, however, rejected the government's argument that law enforcement agents have authority to enforce federal statutes outside the United States. Pet. App. 38a. "Congress may have intended the reach of a criminal statute to extend beyond our borders," the court stated, but that does "not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so." *Ibid.* The court accordingly rejected the government's contention that 21 U.S.C. 878(a)(3), which places no express territorial limits on the DEA's arrest authority, gives DEA agents enforcement authority co-extensive with the geographic scope of the laws they are charged with enforcing. Pet. App. 40a-41a. Instead, the court invoked the presumption against extraterritoriality and distinguished *Bowman*: Because the arrest authority provided by Section 878 is a regulation of "executive authority, not criminal conduct," the court stated, the provision cannot "be classified as a 'criminal statute[] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Id.* at 41a-42a. The court stated that it was unwilling to assume that Congress had "turned a blind eye to the interests of equal sovereigns and the potential violations of international law that would inevitably ensue." *Id.* at 46a-47a.

Agreeing with the reasoning of the original panel opinion, the majority also rejected the claim that the seizure could be deemed a valid citizen arrest under California law. *Id.* at 70a-72a.

The majority stressed that it was not questioning "the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise." Pet. App. 47a. But the court declared that it would not "impute such an intent where it is not expressed," *ibid.*, and thus would not permit extraterritorial enforcement even of those laws that by their terms apply extraterritorially "absent a clear directive" from Congress, *id.* at 50a.

While holding respondent's arrest to be "false" precisely because it occurred in Mexico, the court of appeals concluded that the arrest was actionable notwithstanding the FTCA's exclusion of claims "arising in a foreign country." Pet. App. 65a-68a. The claim, the en banc majority held, fell within the "headquarters doctrine" (as articulated by the California courts, *id.* at 66a) because respondent's seizure was planned and coordinated in the United States. *Id.* at 67a-68a.

Finally, the en banc court affirmed the judgment against Sosa. Disagreeing with the panel opinion, the majority held that there is no specific, universal, and obligatory rule of international law according individuals a personal right to be free of transborder arrests. Pet. App. 21a-28a. But the en banc majority held that there is an obligatory rule of international law prohibiting "arbitrary arrests." *Id.* at 28a-30a. Respondent's arrest was "arbitrary," the court further held, because it was authorized neither by United States nor Mexican law. *Id.* at 33a. Sosa has filed a separate petition

challenging the ATS judgment against him, No. 03-339 (filed Sept. 2, 2003).[2]

b. Judge Fisher filed a concurring opinion, joined by Judges Schroeder, Goodwin, Thomas, and Paez. Pet. App. 73a-80a. Judge Fisher, while fully joining the majority opinion, concluded that the DEA agents lacked authority to conduct this arrest because "neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of that authority." *Id.* at 73a. Judge Fisher stated that, while "Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, * * * that does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law." *Id.* at 79a.

c. Judge O'Scannlain dissented in an opinion joined by Judges Rymer, Tallman, and Kleinfeld. Pet. App. 80a-108a. Judge Gould dissented separately. *Id.* at 108a-121a. Judge O'Scannlain's dissent began:

> We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our gov-

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[2] The United States has not in this petition asked this Court to review the Ninth Circuit's decision that Sosa is liable under the ATS because that judgment runs against (and thus aggrieves) only Sosa, not the United States. On September 25, 2003, however, the United States filed a brief as respondent supporting Sosa's petition in case No. 03-339.

> ernment for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.

Pet. App. 80a. The dissenting judges all agreed with the government's position that "the DEA was well within its delegated powers when arresting Alvarez." *Id.* at 103a (O'Scannlain, J., dissenting); *id.* at 120a n.7 (Gould, J. dissenting) ("I agree * * * that federal law authorized the DEA agents' conduct.").

The relevant statutory provisions, Judge O'Scannlain explained, confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of United States" as well as authority to "perform such other law enforcement duties as the Attoney General may designate," without limiting geographic scope. Pet. App. 103a (quoting 21 U.S.C. 878(a)). "Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which [respondent] was charged, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case." *Ibid.* "Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal." *Id.* at 104a.

The majority's contrary decision, Judge O'Scannlain observed, leads to the anomalous result of a federal criminal prohibition that no Executive Branch official can enforce:

> [I]f Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged,

> to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.

Pet. App. 105a.

Congress thus "left to the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prosecute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure" arrests abroad. Pet. App. 101a. Judge O'Scannlain concluded: "The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security." *Id.* at 107a-108a.

In a separate dissent, Judge Gould concluded that the case "presents a nonjusticiable political question." Pet. App. 108a. He explained that the decision to order the capture of a foreign national on foreign soil involves delicate foreign policy questions, such as whether "the need to prosecute [respondent] for the torture and murder of an American official justif[ies] * * * actions that might offend Mexico's government?" *Id.* at 114a. By engaging that issue, he observed, "the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 117a. "[I]f the judiciary is to preserve its legitimacy, to show

the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations," he added, "judges must show more restraint than the majority shows today." *Id.* at 120a-121a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's en banc decision in this case declares that the United States may be held liable in damages for arresting a criminal suspect who was properly indicted by a grand jury on probable cause to believe that he participated in the torture and murder of a federal agent, simply because the arrest occurred in Mexico. In reaching that result, the Ninth Circuit held that federal officers charged with enforcing laws, including laws that expressly apply to conduct in foreign nations, cannot do so outside the United States. At the same time, the Ninth Circuit held that arrests that are allegedly unlawful *precisely because* they took place in a foreign nation are actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite that statute's exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k).

Those holdings are not merely incorrect. They have profound consequences for the Executive Branch's ability to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and thereby to ensure the security of this Nation and its citizens. The statutory law enforcement authority that Congress gave DEA agents, like the authority given to other federal law enforcement agencies such as the Federal Bureau of Investigation, does not impose geographic limits. Nor does it require that arrests take place pursuant to a warrant. It thus is naturally read as granting the Executive Branch enforcement authority that extends as far as the laws it is charged with enforcing and wherever enforcement is deemed necessary and prudent.

The Ninth Circuit, however, concluded that federal agents lack statutory authority to engage in law enforcement activities outside the United States with or without the "consent or assistance of the host country." Pet. App. 35a & n.24. That holding threatens the government's ability to conduct necessary law enforcement operations abroad to combat terrorism, international crime, and the flow of illegal drugs into the United States. It provides terrorists or other criminals who hide in countries unwilling or unable to apprehend them using their own officers (including countries that are unwilling to acknowledge publicly their approval of U.S. actions) a safe harbor from federal law enforcement agencies, even though the criminals' actions are subject to United States law and have effects on the United States. Cf. *Steele* v. *Bulova Watch Co.*, 344 U.S, 280, 286-288 (1952). Finally, the Ninth Circuit's expansive view of the so-called "headquarters exception" effectively nullifies the FTCA's exclusion for "any claim arising in a foreign country," inappropriately intrudes into the Executive's control over foreign affairs, and opens the way for judicial supervision of the Executive's conduct of foreign policy and law enforcement activities abroad.

To be sure, the use of transborder arrests without foreign government consent to render criminal suspects is exceedingly rare. But judgments regarding the necessity of such measures—and the choice among law enforcement methods generally—are for the Executive Branch to make. It is precisely when criminals are harbored abroad that diplomatic, foreign policy, and law enforcement concerns overlap and must be balanced, and that the need for decisionmaking by the Executive Branch becomes paramount. That is the branch the Constitution charges with conducting the Nation's

foreign policy. See U.S. Const. Art. II, § 2. That is the branch the Constitution charges with "tak[ing] Care that the Laws be faithfully executed." *Id.* Art. II, § 3. And that is the branch that is diplomatically accountable abroad and politically accountable at home "for any whirlwind" that its actions may produce. Pet. App. 107a-108a.

1. a. Threats to the Nation's security and citizenry are now, more than ever, transnational phenomena. Individuals can, for example, commit crimes inside the United States and then retreat abroad. Increasingly, moreover, attacks on United States interests may be planned and even executed abroad. Recognizing as much, Congress has enacted criminal statutes that extend to extraterritorial conduct. Here, for example, respondent was indicted for kidnapping an internationally protected United States government employee in violation of 18 U.S.C. 1201 and 1203, statutes that expressly apply to acts outside the United States. Many similar criminal prohibitions apply extraterritorially as well. See, *e.g.*, 18 U.S.C. 1119 (murder of U.S. national in a foreign country); 18 U.S.C. 2332b (foreign terrorist activity); 18 U.S.C. 175 (extraterritorial use of biological weapons); 18 U.S.C. 351, 1751 (extraterritorial crimes committed against high government officials); 18 U.S.C. 1956 (extraterritorial money laundering); 18 U.S.C. 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1203(b)(1) (hostage taking); 49 U.S.C. 46505 (carrying weapons or explosives aboard aircraft); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes relating to releasing national security information).

The Executive Branch thus may sometimes determine that its constitutional obligation to "take Care that the Laws be faithfully executed" requires the per-

formance of law enforcement activities abroad. It is "beyond doubt * * * that Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'" *United States* v. *Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Consistent with that, Congress has granted federal law enforcement officials broad authority to make arrests without a warrant for any felony, cognizable under the laws of the United States, on probable cause to believe the suspect committed the felony, without imposing territorial limits on their authority. Thus, 21 U.S.C. 878(a)(3), (5) gives DEA agents authority to "make arrests without warrant * * * *for any felony, cognizable under the laws of the United States*, if he has probable cause to believe that the person to be arrested has committed * * * a felony," and to "perform such other law enforcement activities as the Attorney General may designate." Similarly, 18 U.S.C. 3052 gives FBI agents the authority to "make arrests without warrant for any offense against the United States committed in their presence, *or for any felony cognizable under the laws of the United States* if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." Because many "felon[ies] cognizable under the laws of the United States" can arise under statutes that apply extraterritorially, those statutes by their terms give the agencies authority to enforce federal law abroad, and afford the Executive Branch the discretion to determine when and whether —in its conduct of foreign affairs—extraterritorial criminal law enforcement activities are appropriate.

To reach the contrary result, the Ninth Circuit invoked the general presumption against extraterritorial application of United States laws identified in cases

such as *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. at 248. But this Court has refused to apply that presumption to criminal statutes that logically should extend to acts abroad. See *United States* v. *Bowman*, 260 U.S. 94, 98 (1922) (explaining that "the general presumption against extraterritorial application" does not apply to those "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction"); see also *Yousef*, 327 F.3d at 87-88. In light of *Bowman* and the fact that many criminal statutes expressly apply extraterritorially, the DEA's arrest authority is not a statute that is silent or ambiguous as to its extraterritorial effect. By expressly providing the authority to arrest "for *any felony*, cognizable under the laws of the United States," 21 U.S.C. 878(a)(3) provides for extraterritorial arrest authority with sufficient clarity to overcome the presumption against extraterritoriality.

In any event, *Bowman* suggests that the presumption has no application to a statute defining the authority to enforce federal criminal laws. The government's interest in enforcing its laws and bringing criminals to justice does not, as a logical matter, end at the Nation's borders. Nor does it terminate merely because the suspect flees or acts from abroad. To the contrary, Congress has made the international scope of law enforcement authority clear by enacting criminal prohibitions, like the ones at issue here, that apply to conduct committed wholly abroad. To conclude that United States law enforcement agencies nonetheless have no authority to conduct arrests outside the United States is to declare that Congress has chosen to create criminal laws applicable to conduct abroad, and to authorize arrests for *any felony*, but implicitly to deny the Executive Branch agencies charged with enforcing those

laws authority to secure arrests for any felony committed abroad.[3]

Congress was unquestionably aware of the broad enforcement discretion it granted by authorizing DEA agents to conduct arrests for any and all felonies cognizable under federal law, such as violations of 18 U.S.C. 1201(a), 1203. That arrest authority was intended to "provide[] the Attorney General with flexibility in the utilization of enforcement personnel *wherever and whenever the need arises.*" H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 54 (1970) (emphasis added). And, in enacting later substantive criminal prohibitions that apply to conduct abroad, Congress contemplated their extraterritorial enforcement as well, with or without overt cooperation from foreign governments. See, *e.g.*, 131 Cong. Rec. 18,870 (1985) (Sen. Specter) (endorsing statute criminalizing the murder of U.S. nationals abroad, explaining that "if the terrorist is

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[3] Where Congress enacts laws of extraterritorial application but wishes to limit their extraterritorial enforcement, it has done so expressly. For example, under 46 U.S.C. App. 1903(a), it is "unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." In defining the vessels subject to the prohibition, Congress included a vessel on the high seas "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States," and "a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1). This statute shows that where Congress wishes to limit the enforcement of its extraterritorial statutes to require the consent of another country, it does so clearly as part of the substantive criminal statute.

hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Libya, where the Government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial").[4]

By reading the DEA's expansive arrest authority as implicitly geographically limited, the Ninth Circuit's decision not only implausibly presumes that Congress meant to extend the reach of federal law abroad without corresponding enforcement power, but also presumes that Congress likewise meant to deny the Executive Branch authority to use its law enforcement powers whenever criminals commit offenses here but flee the Nation's borders. As the dissent in this case explained, "if Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which [respondent] was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch." Pet. App. 105a.

The Ninth Circuit's invocation of international law in support of its narrow construction of the DEA's arrest

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[4] Congress similarly recognized the international nature of the drug trade that the DEA is charged with combating, directing that the "illegal traffic in drugs should be attacked with the full power of the Federal Government." H.R. Rep. No. 1444, *supra*, at 9; see *id.* at 18 (regulating drugs pursuant to Congress's "foreign commerce power"); *id.* at 78 (prohibition "intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States" if the drugs are to be imported into the United States); *id.* at 71-72 (enacting provisions governing importation of illegal drugs).

authority, see Pet. App. 38a, is likewise misplaced. Congress should not be presumed to hinder the Executive Branch's ability to make case-specific judgments about the proper degree of formal or informal foreign cooperation that is appropriate in apprehending a criminal. To the contrary, Congress presumably understands that the Executive Branch has principal responsibility for international relations, and Congress justifiably relies on the Executive Branch to carry out its functions with the requirements of international law in mind. *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (reiterating "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981)).

The Ninth Circuit's refusal to recognize extraterritorial arrest authority, in any event, sweeps more broadly than that court's international law rationale and ultimately proves too much. It is not a violation of international law for the Executive Branch to order the transborder arrest of a criminal suspect with the foreign country's consent, whether that consent is given publicly or confidentially. Yet the Ninth Circuit construed 21 U.S.C. 878 to deprive a federal agency of authority to conduct a transborder arrest even under those circumstances. Pet. App. 35a n.24. The more sensible reading is that Congress both granted the Executive broad authority to determine where and when to enforce federal law, and relied on the Executive Branch—the branch primarily responsible for foreign relations and primarily accountable to foreign nations—to take into account considerations such as international law.

The Ninth Circuit's reliance on avoiding international conflict, moreover, does not make sense on its own

terms. While the Ninth Circuit would bar the DEA from engaging in federal law enforcement activities (such as arrests) abroad, that court expressly permits the use of the *armed forces* to do the same. Pet. App. 3a; see *id.* at 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). But the Ninth Circuit did not explain why the interest of preventing international strife would favor the use of military force rather than ordinary law enforcement officers.[5] Nor could it. By eliminating one option otherwise available to the Executive, namely the extraterritorial use of law enforcement agencies, the Ninth Circuit favored the use of another mechanism—the armed forces—that is less likely to be acceptable to foreign countries and more likely to create international strife.[6]

Extraterritorial enforcement efforts undertaken without overt consent from foreign governments are uncommon. The norm is to seek and obtain extradition or other cooperation from the foreign nation. Because extraterritorial arrests risk violating the territorial sovereignty of a foreign power, they may become the subject of international protest that must be handled as a matter of State-to-State relations. See *Alvarez-*

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[5] The Ninth Circuit likewise did not dispute that the Executive Branch has inherent authority to employ domestic law enforcement agents for national security functions abroad.

[6] Moreover, the Ninth Circuit's decision threatens to embroil courts adjudicating false arrest claims like this one in fine and difficult distinctions among military, national security, and law enforcement activities, or determining to which agency a particular arrest must be charged, matters for which the judiciary is ill-suited. See Pet. App. 80a-81a n.1 (O'Scannlain, J., dissenting); *id.* at 117a (Gould, J., dissenting). There is thus reason for concern that "the line the majority trie[d] to draw in limiting its decision is more illusory than real." *Id.* at 117a n.5 (Gould, J., dissenting).

Machain, 504 U.S. at 669.[7] As respondent's seizure demonstrates, there is sometimes a steep diplomatic price to be paid for exercising extraterritorial law enforcement power. See Pet. App. 25a-26a n.14 (discussing the diplomatic consequences). As the dissenting judges recognized, however, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches" rather than the courts to make. *Id.* at 107a-108a. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (restriction on searches abroad "must be imposed by the political branches through diplomatic understanding, treaty, or legislation").[8]

b. The Ninth Circuit's decision in this case intrudes gravely on the Executive's prerogative and ability to enforce the laws and ensure national security through the means it finds most appropriate. The ruling does not merely bar DEA agents from enforcing United States law, but also casts doubt on the authority of FBI

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[7] There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate. See Restatement (Third) of Foreign Relations Law § 432 & cmt. c (1986).

[8] The concurring judges argued that respondent's extraterritorial arrest was unlawful because it was not authorized by the President or Attorney General. The majority, however, held that the DEA lacks statutory authority for arrest outside the United States without regard to such high level authorization, and the statutes at issue here nowhere state that the President or Attorney General must authorize the exercise of the arrest authority abroad. Of course, where the Attorney General directs his subordinates not to conduct such arrests absent his express authorization, the violation of such a directive is a serious matter that may lead to discipline or other actions against the responsible subordinate. It does not, however, create judicially enforceable rights that may be asserted by individuals.

agents to do so. See p. 15, *supra*. Indeed, the reasoning the Ninth Circuit rejected in this case is precisely the analysis adopted by the Office of Legal Counsel in upholding the extraterritorial law enforcement and arrest authority of the FBI. See *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163 (1989), *available at* 1989 WL 595835. Thus, just when the importance of the fight against international terrorism (including drug cartel-funded narco-terrorism, see <http://www.dea.gov/pubs/cngrtest/ct052003.html>), and international computer crimes is at its apex, the Ninth Circuit's ruling draws into question the authority of the Nation's leading law enforcement agencies to combat those crimes and to bring to justice those who violate federal criminal statutes applicable to acts committed abroad. "The effective operation of government cannot condone the hiatus in the law that * * * construction would cause." *United States* v. *Cotten*, 471 F.2d 744, 750-751 (9th Cir.), cert. denied, 411 U.S. 936 (1973).

Notwithstanding their rarity, extraterritorial law enforcement actions without public cooperation by foreign governments are sometimes critical to the administration of justice and national security. See, *e.g.*, *Kasi* v. *Angelone*, 300 F.3d 487 (4th Cir.) (FBI arrest of fugitive in Pakistan who killed two CIA agents when seeking to assassinate the Director of the CIA), cert. denied, 537 U.S. 1025 (2002).[9] Thus, the Ninth Circuit's

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[9] Mir Aimal Kasi opened fire with an AK-47 on a line of cars waiting to enter CIA headquarters in Langley, Virginia, in an effort to kill the CIA Director; he killed two agents and wounded three others. Kasi then fled to Pakistan and successfully avoided capture by hiding near the border of Afghanistan. After he was indicted in the United States in 1997, FBI agents located and

ruling would appear to have precluded federal agents locating Osama Bin Laden in Afghanistan before (or after) the attacks of September 11, 2001, from exercising their law enforcement authority to seize him. And the decision likewise casts into doubt the efforts of United States law enforcement agencies to apprehend individuals who may be abroad, plotting other illegal attacks on United States interests.

Under the Ninth Circuit's decision, moreover, such arrests may be deemed unlawful (and require the United States to compensate the arrested suspect in money damages) even if undertaken *with* the express, tacit, or covert consent of the foreign nation. Pet. App. 35a n.24.[10] That undermines the ability of the United

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seized Kasi from Pakistan and transported him to the United States, where he was tried and convicted. Under the Ninth Circuit's decision, however, that arrest may well be deemed unlawful, whether or not Pakistan consented, protested, or cooperated actively or tacitly in the capture.

[10] The panel's vacated ruling read the arrest authority to extend abroad, but to require the consent of the foreign country where the arrest takes place. Pet. App. 144a. The en banc majority's opinion, however, simply holds as a matter of statutory construction that the federal officials do not have extraterritorial arrest power, and adopted a rule that the grant of such arrest power must be expressed by Congress. That ruling leaves in doubt whether federal law enforcement officials are authorized by statute to arrest a criminal suspect in a foreign country even with that country's express consent. *Id.* at 35a n.24. But even the textually implausible view of the now-vacated panel opinion—that the statute grants the DEA authority to conduct arrests abroad conditioned on foreign consent—places courts in the middle of potentially sensitive matters of foreign relations. Whether a foreign nation consented, protested, or cooperated actively or tacitly in the capture of criminals is not a proper matter for judicial inquiry. *Id.* at 99a-101a (O'Scannlain, J., dissenting). If another country has objections to the law enforcement efforts of the United States abroad, that is a

States even to work with foreign sovereigns for extradition or cooperation in arresting such individuals, eliminating the possibility of quiet or covert acquiescence in the use of DEA agents to effect an arrest.

It is hard to imagine that Congress intended that result. As this Court explained in *Verdugo-Urquidez*, "[s]ome who violate our laws may live outside our borders under a regime quite different from that which obtains in this country." 494 U.S. at 275. The Executive Branch must have the ability to respond to "[s]ituations threatening to important American interests [that] may arise half-way around the globe." *Ibid.* It must have the flexibility to respond with the tools that best balance foreign policy and law enforcement objectives, rather than being limited to the armed forces or nothing approach of the Ninth Circuit. Because the Ninth Circuit's en banc ruling creates a dangerous and untenable cloud of uncertainty over vital law enforcement efforts, review by this Court is plainly warranted.

2. While denying a federal law enforcement agency the authority to enforce federal law abroad, the Ninth Circuit accorded itself authority under the FTCA to pass on the propriety of foreign arrests notwithstanding the FTCA's express exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The Ninth Circuit did not deny that, because the "foreign country" exclusion is a limit on "the scope of the United States' waiver of sovereign immunity," it must be construed strictly in favor of the United States. See *Smith* v. *United States*, 507 U.S. 197, 201, 203-204 (1993). Nor did the Ninth Circuit dispute that respondent's arrest took place in a foreign country. To the contrary, the only reason the court of appeals found the arrest of an

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matter for diplomatic resolution, which may be conducted outside public view.

indicted suspect on probable cause to be "false"—and thus tortious—was that it took place in Mexico.[11] The court, moreover, expressly agreed that liability began with respondent's seizure in Mexico, and ended when respondent was delivered into the United States. Pet. App. 60a-64a. Under the circumstances, the claim inescapably arose in a foreign country and thus is excluded from the scope of the FTCA.

To avoid that result, the Ninth Circuit held that the acts of DEA officials in the United States were the proximate cause of the false arrest in Mexico. This Court has explained, however, that the foreign country exception must be viewed together with 28 U.S.C. 1346, which "waives the sovereign immunity of the United States for certain torts committed by federal employees 'under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*'" *Smith*, 507 U.S. at 201 (quoting 28 U.S.C. 1346(b)). Here, the allegedly tortious "act" of false arrest indisputably occurred in Mexico. The actions undertaken in the United States, in contrast, were not tortious. It is not a tort to procure the arrest of someone on probable cause that a felony has occurred, which is what the DEA agents did. The

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[11] In doing so, and invoking the so-called "headquarters doctrine," the Ninth Circuit followed its own precedent in *Nurse* v. *United States*, 226 F.3d 996 (2000), and cited decisions from other circuits, including *Sami* v. *United States*, 617 F.2d 755 (D.C. Cir. 1979), and *Couzado* v. *United States*, 105 F.3d 1389 (11th Cir. 1997). Those decisions, however, rob the FTCA's express foreign country exception of much of its force. Particularly in light of sovereign immunity principles and the separation of powers concerns raised by application of the FTCA to law enforcement conduct abroad, the so-called headquarters doctrine merits the Court's review and attention.

actual arrest in Mexico may have violated Mexican law and Mexican sovereignty, since the officers did not comply with Mexican legal requirements. But liability under the FTCA cannot be predicated on a violation of foreign law. See *United States* v. *Spelar*, 338 U.S. 217, 220-221 (1949) (Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power.").[12]

The Ninth Circuit's decision also creates one of the very consequences that Section 2680(k) is designed to avoid—judicial intervention into matters of foreign relations constitutionally reserved for the political branches. That error, moreover, pervades the court's decision. When determining the *judiciary's* authority under the FTCA, the Ninth Circuit construed the FTCA broadly to permit adjudication of the validity of an extraterritorial arrest, notwithstanding an express exception for claims arising abroad. When determining

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[12] The Ninth Circuit also denied federal officers the ability to conduct a "citizen's arrest," when they are acting outside of their statutory authority, even though non-officers can make such arrests on probable cause. See Pet. App. 70a-72a. Thus, even though an ordinary California citizen acting without statutory authority would commit no tort by arresting respondent on probable cause outside California, see *id.* at 184a-190a, federal officers acting in locations where they similarly have no statutory authority are deemed to commit a tort for conducting the identical arrest solely because they are federal officers. *Id.* at 71a-72a. Such rank discrimination against federal officers is impermissible, and in any event conflicts with the FTCA's direction that the government is subject to liability only to the extent a private person would be under like circumstances. For *constitutional* purposes, of course, federal officers are subject to restrictions that private citizens are not. But there is no basis for imposing common-law tort liability on federal officers for conducting arrests without statutory authority, where the same arrest would be privileged when conducted by a private citizen acting without government involvement.

whether the *judiciary* should impose liability under the FTCA for that foreign arrest, the Ninth Circuit applied state law broadly, holding an arrest in Mexico to be tortious through an extraterritorial application of California law. And when deciding the scope of the *judiciary's* authority to recognize causes of action under the ATS, the Ninth Circuit gave that statute a similarly broad and extraterritorial construction, holding that it permits courts to adjudicate, under international law, disputes between foreign nationals arising out of events taking place abroad. See U.S. Br. Supporting the Petition at 26-27 in *Sosa* v. *Alvarez Machain*, No. 03-339. But when passing on the scope of *Executive Branch* authority to conduct arrests and enforce federal law abroad under a statute that contains no express geographic limits, the Ninth Circuit invoked the presumption against extraterritorial application to deny the Executive Branch that authority—even though the laws the Executive is charged with enforcing by their very terms apply to conduct taking place abroad.

That gets it precisely backwards. In matters touching on foreign relations and law enforcement—whether, where, when and how to enforce federal law—Executive authority is at its apogee and judicial expertise at its nadir. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial," as they involve "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Egan*, 484 U.S. at 529-530 ("[F]oreign policy [is] the province and responsibility of the Executive.") (quoting *Haig*, 453 U.S. at 293-294); *Haig*, 453 U.S. at 292 ("Matters intimately related

to foreign policy and national security are rarely proper subjects for judicial intervention."). And it is precisely to avoid judicial or private actions that would trench on the Executive's authority to conduct foreign relations that Acts of Congress are presumed not to have extraterritorial effect. No less than the Constitution, federal statutes that on their face *grant* the Executive Branch authority should not be construed to disrupt the ability of that Branch "to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 274, or to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Because the Ninth Circuit's decision inverts ordinary principles to maximize judicial authority in this area and minimize that of the Executive Branch, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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